FILED
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
THE STATE OF FLORIDA, ETC.,
Defendant in Error.

No. ~~105~~ 10
and
No. ~~155~~ 11.

THE ATLANTIC COAST LI
RAILWAY COMPANY,
Plaintiff in Error,
v.
THE STATE OF FLORIDA, ETC.,
Defendant in Error.

No. ~~152~~ 9.

Supplemental Brief for Defendant.

WM. H. ELLIS, Attorney-General.
J. M. BARRS, Special Counsel.
Attorneys for Defendant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

SEABOARD AIR LINE RAILWAY, Plaintiff-in-Error, vs. THE STATE OF FLORIDA, upon the relation of W. H. ELLIS, as Attorney-General, *et al.*	Nos. 155 and 156.
THE ATLANTIC COAST LINE RAILWAY COMPANY, Plaintiff-in-Error, vs. THE STATE OF FLORIDA, upon the relation of W. H. ELLIS, as Attorney-General, *et al.*	No. 152.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

Plaintiffs in error failed to have the records printed in time to permit defendant in error to possibly file briefs as required by the rules of this court before the cases were first reached on the docket, and failed so long thereafter to file

their briefs that attorneys for defendant in error came to the conclusion that they did not intend to file such briefs at all. We, therefore, under that impression, filed our first briefs.

This brief is not intended as taking the place of those heretofore filed, but as supplemental thereto, and as replies to Briefs of Plaintiffs in Error.

The briefs for plaintiff in error were filed for the Seaboard Air Line Railway, February 17, and for the Atlantic Coast Line Railroad Company, we understand, will be filed still later. Attorneys for defendant in error, therefore, present for the consideration of the Court in reply to the plaintiff the following:

The three above-entitled cases were tried in the Supreme Court of Florida at the same time upon identically the same issue, the issue in each case being presented as a return to an alternative writ, the return and joinder of issue thereon being in the three cases in identically the same language, the return being,

"that the passenger and freight tariff prescribed by the Railroad Commission of the State of Florida, to be observed by the defendant in the carriage of freight and passengers in the said State of Florida, including the schedule or tariff of rates sought to be enforced in this proceeding, are unreasonable and do not give to the defendant fair and reasonable compensation for the services required to be performed by it in the carriage of such freight and passengers, and that the enforcement of such tariff and rates of said Florida Railroad Commission will result in depriving respondent of its property without due process of law and of the equal protection of the laws contrary to the guarantees of the Constitution of the United States and the amendments thereof."

The alternative writ and every subsequent pleading in numbers 152 and 156 hereinafter referred to as Phosphate Rate cases are identical, the names of the railroad companies only excepted. The alternative writ and earlier pleadings in 155 hereinafter referred to as the West Shore case are somewhat different from those in 152 and 156, but the only question before this Court is based on the amended return above quoted, upon which issue was joined. The three cases having been tried and decided together upon the same issue, it is understood among counsel that they will be submitted in this Court

together. This one brief will, therefore, be submitted by us in the three cases, noting herein briefly such differences as are presented by the three records.

Plaintiffs in error do not question the authority of the Railroad Commission under the Constitution and laws of Florida, to make and enforce rates for the transportation of freight and passengers from points in Florida to points in Florida, limited only by the provisions of the Federal Constitution against the taking of property without due process of law; or the right of the State to enforce the orders of the said Railroad Commission by mandamus, instituted originally in the Supreme Court of the State; or the regularity of the proceedings before the Railroad Commission preliminary to the making of its orders; or the *prima facie* reasonableness, justice and validity of the findings and orders of the Commission; or the duty of the courts to enforce the orders of the Commission, in the absence of an affirmative showing before the Court made by the defendant in a mandamus proceeding sufficient to overcome the *prima facie* validity of the orders of the Commission; and they are entirely manifest by reference to the Constitution and laws of Florida, and cannot be reviewed by this Court.

We will submit that attorneys for plaintiffs in error contend only that the Supreme Court of Florida erred in findings of fact, and that the findings of the Supreme Court of Florida, and facts as stated in its opinions, are conclusive in this Court. We submit, however, that the findings of fact in the Supreme Court of Florida, and the decisions in that Court, were not erroneous, even if reviewable as findings of fact, in this Court.

The opinions of the Supreme Court of Florida speak most convincingly for themselves on this point.

In the phosphate rate cases the Railroad Commission of Florida had fixed a rate of freight on phosphate, with certain limitations and provisions, at one cent per ton per mile, and these orders are sought to be enforced, and in the West Shore case the Railroad Commission was seeking to enforce a rule made by that Commission in pursuance of law (sustained as to its validity by the Supreme Court of the State of Florida) which is as follows:

"All railroads which are under the management or control by lease, ownership or otherwise of one and the same

company and all connecting roads, the majority of whose stock is owned or controlled, either directly or indirectly by one of the connecting lines, shall for the purpose of transportation in applying their schedules of freight rates be considered as constituting but one and the same road, and the rates shall be computed as upon parts of one and the same road, unless otherwise specified. The fact that each of said roads has a separate Board of Directors shall not prevent the application of this rule. Whenever any railroad company owns and operates in connection with its road for the purpose of transporting its cars, freight or passengers in steamer or other water craft, such steamer or water craft shall be deemed a part of its said road."

The railway companies having pleaded that the enforcement of the orders of the Railroad Commission in these cases would practically confiscate their property, and issue being joined on that return, and the *prima facie* reasonableness, justice and validity of the orders being legally established and the burden of overcoming this *prima facie* character of the order being placed upon the railroad companies, trial of the three cases were entered upon.

Under the Florida laws the Railroad Commission have the right to fix and do fix all rates of transportation, limited only (at least so far as review by this Court is concerned) by the provision of the Federal Constitution against taking property without due process of law.

The findings and orders of the Commission being *prima facie* reasonable, just and valid, they will be enforced unless it is shown affirmatively by the Railway Companies that it is impossible for them to make a reasonable profit on their Florida Intra-State business. These companies have no legal right to charge rates to some places, or to some shippers or on some articles less than allowed by the Commission's Rates and make up losses so sustained by charging rates to other places, or to other shippers or on other articles in excess of the rates fixed by the Commission.

Limited only by the provisions of the Federal Constitution against taking property without due process of law, the Commission are vested with the discretion as to the distribution of the burthen of transportation charges upon the various subjects of transportation. If the entire schedule of rates, taken as a whole, will permit the Railway Company

to derive a reasonable profit from its Florida Intra-State Business upon that part of its Florida lines engaged in the business of Florida Intra-State transportation, the company must comply with the orders of the Commission.

The orders of the Commission being *prima facie* reasonable, just and valid, the Company attacking the order must show what part of its property is used for the purposes of carrying on its Florida Intra-State business, the value thereof and the cost of operation and maintenance thereof, and what has been or what will be (and this must not be speculative), the possible revenue from that business under the schedules of rates fixed by the State Commision. And that revenue must be the *actual* revenue, and not an *estimated* revenue, estimated as is attempted to be done in these cases by taking the *actual* number of tons of Florida Intra-State Freight hauled one mile, and multiplying it by the average rate received from an entire system covering several states. The average rate of freight, for instance, on all Florida Intra-State business, which includes great quantities of such extremely high grade freights as fruits, early vegetables, &c., is between three and one-half and four cents per mile, while the average rates on the whole systems, including iron ore, coal, &c., is for through and local combined, a little less than one-third the average Florida Intra-State Rate.

Evidence.

The Atlantic Coast Line presented and took the testimony of several witnesses and introduced certain reports made to and by the Florida Railroad Commission. The Seaboard Air Line offered in evidence only certain reports made to and by the Florida Railroad Commission, but swore no witnesses. The State of Florida in the Atlantic Coast Line Railroad case offered and filed in evidence the report made for the year ending June 30, 1902, of certain railroad companies which at the time of the making of this order constituted the Atlantic Coast Line Railroad Company in Florida, these reports having been called to the attention of one of the witnesses for the railroad company and he having been cross-examined with reference to them.

The witness for plaintiffs in error, W. B. Denham, Superintendent of the Second Division of the Atlantic Coast Line Railroad Company, testifies that he had been the General Superintendent of the Plant System lines, which, by consolidation, became the A. C. L. in Florida, and that under the Plant System management the accounts of the Florida lines were kept separate and distinct from the other lines of the Plant System, so that there could be ascertained the earnings, expenses, etc., of the Florida lines, but (page 48 of the record in case No. 152)

"since the consolidation the percentage of cost has not been kept separately but has been consolidated and the percentage taken on the entire Atlantic Coast Line Railway System."

In the next sentence in his testimony he states that

"the percentage of cost for the operation of the Florida properties of the Company for the fiscal year ending with June, 1904, was greater than ever before"

which shows the effect of the change in the method of bookkeeping and the consolidatiing of the cost of operation in Florida, where construction and maintenance are extremely cheap, and there are, practically speaking, no grades and the tracks are laid, practically speaking, on a level with the ground, and many of the heaviest items of expense of construction, maintenance and operation are wholly unknown, and where the tonnage per mile and number of trains run are relatively small and the passenger fares and the rates of freight on the great bulk of freight handled are very high, with the corresponding cost of the entire A. C. L.

The witness then proceeds to show the great expensiveness of handling phosphate for foreign shipments, which are not covered and cannot be affected by the orders of the Florida Railroad Commission, for the reason that phosphate rock shipped from mines within the State to ports either within or without the State, there delivered to steamships or sailing vessels for transportation to Europe, as the great bulk of phosphate shipments are shipped, are clearly not within the jurisdiction of the State Railroad Commission, which claims no jurisdiction over such shipments.

The testimony of this witness also shows that the railroad

companies, in the matter of foreign shipments of phosphate rock, give facilities for such shipments which are in themselves very expensive and charge no demurrage upon the cars, as they have a right to charge, and yet such shipments are made, as appears from the evidence of witnesses, at rates not exceeding one cent per ton per mile, whereas, it is manifest that the shipment of phosphate from the mines in the interior of the State to phosphate reduction plants where acid phosphate is extracted from the rock, can be made with vastly less expense than the shipments that are sent abroad, because of the extra expenses shown by this witness to be attendant upon the rushing of phosphate to the ports for delivery to a particular steamer, the day of arrival of which cannot be known ahead, and which must be loaded quickly to avoid steamship demurrage charges.

We respectfully call the attention of the Court to the testimony of this witness on page 48 *et seq.* of the record in case No. 152. This witness near the top of page 50 in the record, says:

"My testimony in regard to additional cost of transportation because of having to hold cars for ships was with reference to shipments from Savannah and Port Tampa going by ship."

We submit also that if the railroad company is forced to put into effect a rate on phosphate for delivery of phosphate from the mines in the interior of the State to the phosphate works at seaports of one cent per ton per mile, which is considerably more than the rate charged on foreign shipments and considerably more than the average rate credited to Florida by the S. A. L. Report, and stated by attorneys for the S. A. L. in their brief on page 6 to be .815 of one cent, the railroad companies can by enforcing demurrage charges and because of the difference in the nature of the shipments, handle the phosphate rock to the phosphate reduction works, at a large saving in the cost of transportation, and unless there is some unknown source of revenue to the railroad companies arising from the foreign shipments through favored ports and over favored lines the enforcement of the rate proposed by the Railroad Commission will, upon such shipments as are made locally, result in a much larger income and a much less expense.

The witness also testified, near the bottom of page 50, that the railroad company collects demurrage on all other freight but never charged demurrage for phosphate, and the witness is all the time testifying with reference to foreign shipments of phosphate. The witness also, on page 51, testifies that the Atlantic Coast Line Railway Company, which operates lines of railway running directly from phosphate fields to the City of Jacksonville, have in effect no rates on phosphate for transportation to Jacksonville, because they have no port to put it in.

On page 52 the testimony of Superintendent Denham contains the following :

"Q. All of your testimony with reference to transporting phosphate is based on your experience with shipments either over your line, out of the State, into Georgia or to Port Tampa, to be delivered to ships to go to foreign countries, is it not?

A. Yes, because we do not handle any other phosphate except the little that that phosphate plant at Jacksonville used to get. It got a little phosphate occasionally, but outside of that there is nothing. That was the only plant in Florida that used any phosphate. That did not take care of twenty cars per year, so practically none was handled. They have been out of business for two years.

Q. Practically no phosphate being handled, according to your opinion, except shipments either foreign or inter-State?

A. Yes."

Perhaps to enable this Court to understand the conditions as the Supreme Court of Florida, and all people in Florida know them, it is well to state that the phosphate mined in the State is all mined in the interior of the State in certain well prescribed sections. Phosphate rock as mined is worthless, except when put through a process which extracts the acid phosphate from the rock, which process is expensive and requires a large plant. Practically speaking, all of the phosphate mined in Florida is shipped out of the State, by far the greater proportion going foreign, the smaller proportion going to various phosphate reduction plants in other States. Efforts have been made and plants have been recently built at ports in the State for the utilizing of the phosphate rock. This is to some extent shown by the testimony of Superintendent Denham.

The testimony shows that the Railway Companies count in their reports all phosphate shipments, absolutely all, as foreign

or inter-State, giving the State no credit for any of the shipments.

The Supreme Court of Florida knows as all other people in Florida know, that there are plants at Jacksonville, Florida, which would, were they given the same rate, or anywheres nearly the same rate, that foreign shipments are given, use considerable quantities of phosphate rock, and yet Mr. Denham testifies that they have no rate to Jacksonville and make no shipments there.

We submit that upon their own testimony that they are not now receiving any revenue whatever from shipments of phosphate from points in Florida to points in Florida, which are amenable to the rules of the Railroad Commission, and that the rates for actual charge on foreign shipments do not exceed the rate fixed by the Commission, one cent per ton per mile, and that the cost of transportation on foreign shipments is very greatly increased because of the necessity for quickly furnishing transportation to ships to prevent their going on demurrage, and that they therefore show beyond question that the enforcement of the Railroad Commission's order cannot possibly reduce either the gross or net incomes, but must necessarily increase both the gross and net revenues of the railroad company, unless the railroad companies are getting some unknown and illegal revenues from foreign shipments.

While considering the testimony of Mr. Denham, we suggest that he shows the absolute unreliableness of the reports made by the railroads to the Railroad Commission, not only by his testimony heretofore noted, to the effect that they do not now keep the accounts of the Florida Division separate from the other Divisions of the road, but also by his statement at the bottom of page 52 and top of page 53, and by the showing of the railroad reports on the top of page 53, to which his attention was called, and which were introduced in evidence.

He had testified, as did Mr. McIver, that the business done by the Coast Line in Florida was considerably better than the business done by the Plant System over the same lines the year before, and (top of page 53),

"witness was shown reports to the Florida Railroad Commission made by the Plant System of Railroads to June 30, 1902,

and by the Atlantic Coast Line System to June 30, 1903. His attention was called to the fact that the Plant System report showed $4,150,481.26 gross earnings from operation of lines in Florida for year ending June 30, 1902, and that the Atlantic Coast Line report showed total gross earnings from operation of same lines in Florida for year ending June 30, 1903, only $3,331,967.16".

"Q. You have testified that the business done by the Atlantic Coast Line for the year ending June 30, 1903, over its Florida Lines was considerably better than the business done by the Plant System over the same lines the year before. Will you explain how it is that the Atlantic Coast Line reports more than $818,000 less gross earnings when they did a considerably better business?

A. I can explain that. You have not Georgia and North Carolina which means a great deal more than that.

Q. This is for Florida?

A. I told you that up to July, 1902, our earnings in Florida and expenses were kept separate and they were operated as one railroad. If you take the expenses of Georgia and North Carolina and put Florida with it the expenses decrease on that ratio.

Q. Is not that a report of the lines in Florida?

A. Report arrived at in that way.

Q. What is the percentage reported for 1903 in Florida?

A. That report is correct if it comes from our people. It is arrived at—the earnings by taking the mileage of Florida as earning the same money as Georgia or North Carolina, which is not the case by any means."

As further showing the unreliability of their reports, and of all figures presented by them, Superintendent Denham, at the bottom of page 53, shows that according to their style of bookkeeping the entire cost of relaying with heavier rails the entire line in Florida and the entire cost of new rolling stock purchased, perhaps for years to come, may be charged up in one year's operating account.

"Q. From your experience would you not say that the percentage of expense to earnings in 1904 will show less than for 1903?

A. I will not say certain because sometimes our expenses fluctuate. It depends on how many cars and engines you have to buy. Railroads don't last always, you know, and you have to buy cars and railroad iron to put back on it and when you buy a foot of railroad iron it costs one dollar for every foot you put down. Our railroads are twenty or twenty-five years old and we have to relay them if we are to operate them. Cars wear out and engines wear out".

We suggest that if the evidence of this witness, on page 54, be true, which we do not believe would be the case on a proper system of accounting, because of the extremely high rates charged on those lines, the Coast Line cannot acquire the right, by the purchase of unprofitable lines like the St. Johns and Lake Eustis and other roads are alleged to be, to refuse to put into effect any rates whatever for the transportation of phosphate from the interior of Florida to phosphate reduction plants at Jacksonville and other ports.

R. S. McKeever, witness for plaintiff in error, testified (page 56, record number 152), that he was auditor of freight receipts under the Plant System, and is now auditor of freight receipts for the Atlantic Coast Line, and says:

"the freight earnings of the Atlantic Coast Line Railway Company for Florida's intra-State business for the year ending June 30, 1904, was $871,926.41."

At the bottom of page 56 he says, explaining the wonderful system of bookkeeping under which his reports are made out:

"receipts are allotted to Florida lines on the basis of tons per mile of the entire Atlantic Coast Line System. The amount of freight receipts allotted to Florida does not report the actual receipts for hauling freight in Florida, but is arrived at by taking the total number of tons of freight hauled one mile on the entire Atlantic Coast Line System in Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama, and the entire freight receipts for the entire System for the year, and thereby ascertaining the average rate per ton for hauling one mile all freight hauled on the System. We then take the actual number of tons of freight handled one mile in Florida, and multiply that by the average rate received by the System and allot the amount so arrived at to the Florida Lines as their earnings. This is the basis on which all of our statements are made. We have some income from mail service but I do not know what it is. No other sources of income are taken into consideration. We treat all phosphate shipments through Port Tampa as intra-State and they are not included in these figures nor are any phosphate shipments included."

On page 859 of the record (No. 152) we find Mr. McKeever, the auditor of freight receipts and the official who makes out all reports to the Florida Railroad Commission, again shows the utter unreliability for the purpose of ascertaining actual receipts and expenditures in Florida of the reports made by

the railroad companies to the Railroad Commission, and also of all the testimony submitted, by explaining the basis on which their figures are made as follows:

"The raising and lowering of rates on phosphate in Florida to Port Tampa affects the receipts of the Virginia Lines just as much as the Florida Lines, according to our method of division, and the raising and lowering of rates in North Carolina affects just as much the per ton per mile the credit given to Florida as to North Carolina. It would be the same if we hauled oranges at so much per ton per mile."

That is to say, that, according to the system of bookkeeping maintained by the railway companies from which the reports to the Railroad Commission are made, and upon which the testimony is all based, the fact that the average rate of freight in Florida is several times the average rate of freight in Virginia and Alabama and very much greater than the average rate of freight in any other State in the Union is utterly ignored and the Florida lines are given credit at no higher rate per ton per mile than other railroads, and Florida is given the same credit for hauling one ton of oranges one mile at four or five cents per ton as is given to Alabama for hauling a ton of iron ore at one-half cent per ton. That is to say, that in Florida where the tonnage is relatively small, and the rate averages a little more than three and one-half cents per ton per mile, including the high class articles such as fruits, vegetables and early truck gardening products, the receipts are arrived at by taking the actual tonnage, which is small and multiplying it by the average rate on the entire System which average rate is fixed to a very great degree by a very cheap rate of hauling iron ore and coal in Alabama and Virginia at less than one-half cent per ton per mile in many instances.

In this way the *actual* rate of over three and one-half cents per ton per mile on Florida Intra-State freight is reduced in the S. A. L. Report, cited by their attorneys on page 6, to .815 of one cent per ton. And yet this Court is asked to reverse the finding of fact of the Supreme Court of Florida upon only such evidence. The reports made to the Railroad Commission presented by the State of Florida in the Court below were presented because they had been shown to witnesses who had been interrogated about them and to show the fact that notwithstanding the witnesses of the railway company had testified that the

business done by the Atlantic Coast Line over the Florida lines was considerably greater than the business done by the Plant System over the same lines the preceding year, these reports made out by the witness McIver, himself, show that under the system of bookkeeping maintained by the Atlantic Coast Line the estimated earnings were made to appear very greatly reduced, below the actual earnings shown by the Plant System.

The testimony of the witnesses presented by the Atlantic Coast Line Railroad Company having shown so clearly the fact that the reports made to the Railroad Commission were worthless as evidence of actual receipts and expenditures in Florida, and that their method of bookkeeping was such that the railroad officers could not testify as to the actual receipts and expenditures in Florida or in fact throw any light upon the real conditions; the Seaboard Air Line called no witnesses whatever, contenting themselves with offering in evidence the report of the said Seaboard Air Line Railway to the Railroad Commission of the State of Florida for the year ending June 20, 1904, which report it was the duty of the railroad company to file, and the filing in evidence of which was permitted only to show that the railway company had complied with that obligation and that the Railroad Commission had that report before it. It certainly cannot be taken without swearing any witnesses as proving the truth of everything found in those reports or as showing the system used in arriving at the statements therein contained. In fact reports being before the Railroad Commission at the time of their action and the findings of the Commission being *prima facie* correct, reasonable, just and legal, we do not think that such a report can be made the basis of a reversal of the decision of the Supreme Court of Florida in this case any more than can the fact, even if proven as set up in the report to the Florida Railroad Commission showing previous reductions in freight and passenger rates, be taken as proving that this action was unreasonable.

We submit that the suggestion that previous reductions

had been made and not fought by the railroads and the fact that during the eight years and more of existence of the Florida Railroad Commission, this is the first time that its findings have been brought before this Court, is rather an indication of the fact that the Florida Railroad Commission is a very conservative body. We are forced to take the other intimations to the effect that the Seaboard Air Line Railway considers the Florida Railroad Commission as a kind of Populistic body, regardless of the interests of railroad owners, about as seriously as we do the suggestion in the brief that the object of the Commission in making the phosphate rate was the cheapening of phosphate to Florida farmers.

In conclusion we submit that there is no evidence that the enforcement of the order will in any way reduce the revenues of the railroad companies in any of the cases, as the simple refusal of the railroad company to obey an order of the Railroad Commission can hardly be taken as such evidence and we have the positive testimony of witnesses presented by the Atlantic Coast Line Railway Company that there are now no shipments of phosphate which are covered by the Railroad Commissions orders. And this proposition was urged time and again by counsel for plaintiffs in error in the Court below as reasons why the order should not be enforced, but the Court held, and properly, that the Commission had a right to require putting into effect of a rate if no rate existed and if necessary to even anticipate business or to make possible business, as, of course, the construction of phosphate reduction plants would necessarily be greatly discouraged by the fact that the railroad companies before had refused to make rates. There is not only no evidence that there will be any shipments of phosphate, under the order of the Railroad Commission over any short distances as for instance five or ten miles or twenty miles, or any other small distance, and in fact the very conditions in Florida would prevent such shipments because of the fact that phosphate is mined in the interior and can be used only by phosphate reduction plants, which must necessarily be located at ports where certain other materials can be gotten together to utilize phosphate rock.

In the West Shore case we submit that the rule is an entirely reasonable one and regardless of profits or expenses of the railways it is entirely reasonable and just that a rule shall be enforced which prohibits a railway company from dividing itself up into a whole lot of little lines and from charging a half dozen local rates in a short distance.

Respectfully submitted,

J. M. BARRS,

Attorney for Defendant in Error.

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Defendant in Error.

No. [redacted] 9.

BRIEF FOR DEFENDANT

Filed by Leave of Court.

J. M. BARRS, Special Counsel,
Attorney for Defendant.

IN THE

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SEABOARD AIR LINE RAILWAY, Plaintiff-in-Error, vs. THE STATE OF FLORIDA, upon the relation of W. H. ELLIS, as Attorney-General, *et al.*	Nos. 155 and 156.
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BRIEF FOR DEFENDANT IN ERROR.

Filed by Leave of Court.

The defendant in error, under the authority to file an additional brief, in reply to the proposition advanced by counsel for the Seaboard Air Line in the concluding argument, that the rate of one cent per ton per mile on phosphate rock, being made in an order which also pro-

vided that existing rates are not raised where the rate is now less than one cent per ton per mile, is, because of that fact, unreasonable and invalid, we suggest that this fact does not argue even any unreasonableness of the order, for the reason that the "pebble phosphate", which is worth even less than "hard-rock phosphate," must, in some instances, be carried a considerable distance, and that a rate of one cent per ton per mile would be on that material absolutely prohibitory to places where it can be utilized, and the railroad companies, recognizing this fact, have themselves made lower rates on "pebble phosphate" on longer hauls.

As to the suggestion that it allows the charging of a less rate to one person than to another person, we reply that the rules of the Railroad Commission, and the Acts of the Legislature prohibit discrimination of that kind.

We also suggest that the Florida Railroad Commission is constantly in session from day to day, and that if any hardship shall be discovered in the workings of the rule, the Commission has power, and will be presumed to stand ready to exercise the power, of modifying its rules and orders, with the consent of the railway company, without notice to any one else.

To make clear the contention in our oral argument that receipts from phosphate freights are not to be reduced by the order, we submit that on page 73 of the record, in case No. 156, Item No. 17, "average receipts per ton per mile" on "traffic and mileage statistics State of Florida", is given as: .00815, which is less than the phosphate rate allowed,—and the sworn returns to the alternative writ of mandamus found on pages 22 and 23 of the Record in No. 156 and on pages 26 and 27 of

the Record in No. 152, show that present rates, if any, do not exceed the rates allowed in the order. The testimony of Denham and McIver in No. 156 shows that all phosphate freight is foreign or inter-State.

We also submit that there is, at least, no evidence to show that the Seaboard Air Line does not use the same method of making out accounts that is used by the Atlantic Coast Line, shown in the testimony of the officers of the Atlantic Coast Line in the record of case No. 152. At any rate, there is an absolute undisputed lack of testimony as to the local or intra-State rate on any commodity in case No. 156, or in No. 152. The rate as shown by the rate sheet on page 8 of the record in No. 155 is a very high one, but there are no phosphate shipments over the West Shore branch of the S. A. L.

There is also an absolute undisputed lack of evidence of any kind as to the amount of local business done, or the profitableness or unprofitableness of the local business done as distinguished from the inter-State or foreign shipments.

Again, the only evidence as to the valuation of the railroad property is on the basis of amount of stock acquired to give control without any evidence as to the price paid for or the real value of the stock.

Under the head of costs of road equipment and terminal improvements on page 56 of the record, in case No. 156, we find as one of the items of cost of the Railroad and equipment the following "Item 26", "Treasury stock bonus to subscribers of $5,000,000. bonds $12,500,000." "cost per mile $4,893.80".

As we understand this statement, patrons of the Seaboard Air Line are to be expected to pay a revenue on a valuation of $4,893.80 per mile because the Seaboard Air Line Management saw fit to give a bonus of $12,500,000. to purchasers of only $5,000,000. of bonds. And again, we find in the next item $12,086.90 costs per mile, upon which they are expected to pay a revenue, is covered in the item "acquired by control of stock", without giving us any information whatever as to the cost of acquiring control of stock, or the value of the stock, or any other information on the subject. And on page 57 we find another item of $894.95 per mile accounted for by "acquired control of stock".

We do not mean by this to say that the Seaboard Air Line Railway did not cost anything, but we do submit that there is no evidence as to what it did cost presented in any such way as would warrant this court in reversing the Supreme Court of Florida on a question of fact and overcoming the prima facie reasonableness of the order of the Railroad Commission.

For the further purpose of showing the elements going to make up the assets of the Seabord Air Line, according to this report, which is the only basis of the appeal to this court, we ask the attention of the court to pages 62 and 63 of the record n case No. 156. On page 62 we find that the Seaboard Air Line Railway, in addition to its *railway and tangible property*, owns railway stocks of the total par value of $46,028,189.53, which produce an "income or dividend received" of only $17,800.00. and which the report estimates as the true valuation, $65,269,144.35. This company owns "other stocks" of total valuation of $868,000.00, which produced "income or dividend received $12,600.00" and

valued at $1,312,038.50. And page 63 shows "Bonds owned-Railway Bonds", "Total par value $5,828,810.-00", on which they received "income or interest received $9,875.00", which is valued in the report at $5,278,534.-23"; and the company also owns "other bonds" amounting to $50,000.00, and they own "one-third interest in $14,000.00 Florida Publishing Company six per cent bonds, on which they receive an income or interest of $280.00, which they value at $800.00. We submit this page is interesting, in this, that, with the grand total par value of bonds of $5,878,810.00 and the total income or interest received on account of those bonds aggregating only $10,155.00, the company's valuation of the same is $5,329,334.23, and the fact being that, according to their showing, the only two bond items on which they received any income or interest whatever are two Florida properties, one of them the Florida West Shore Railway, total par value $395,000.00, paying $9,875.00, being valued considerably below par, and the Florida Publishing Company bonds, which pays the remainder of the entire income received, is valued far below par, while most of the other bonds, which are paying no income or interest, are valued at par, and the "Oxford and Coast Line" first mortgage bonds "$25,-000.00", which has paid no income or interest, is valued at $54,359.36.

We will not take up the Court's time with more details, as scarcely a page of the report can be examined critically without showing that the report is not to be taken seriously in any way.

As absolutely settling case No. 155, the Florida West Shore Branch case, enforcing the Commission's Rule against more than one local rate on a single line, we submis that this branch is not included in any way whatever in the S. A. L. Report offered in evidence, and there is absolutely no evidence of any existing rate, or cost or value of that branch or the business done or any reference whatever to the Florida Wset Shore branch.

The Record in that case pages 57, 58, and 59, give all the roads operated and the Florida West Shore is not found there or elsewhere, that w ecan find.

Respectfully submitted,

J. M. BARRS,

Attorney for Defendant in Error.